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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JHONNY CABRERA,

Plaintiff,

v.

MACA RESTAURANT, CORP. d/b/a FIRENZE RESTAURANT, and MANUEL CAISAGUANO,

Defendants.

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COMPLAINT

CASE NO.:

Plaintiff Jhonny Cabrera alleges as follows:

JURISDICTION AND VENUE

1. This Court has original federal question jurisdiction under 28 U.S.C. § 1331 because this case is brought under the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* ("FLSA"). This Court has supplemental jurisdiction over the New York state law claims, as they are so related to the claims in this action within the Court's original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

2. Venue is proper in this District because Defendants conduct business in this District, and the acts and/or omissions giving rise to the claims herein alleged took place in this District.

PARTIES

3. All Defendants are hereinafter collectively referred to as "Defendants."

4. Defendant Maca Restaurant Corp. is a New York corporation that owns and operates Firenze Restaurant located on the Upper East Side in Manhattan.

5. Firenze closed down briefly in February 2017 due to a fire and is set to reopen shortly at a nearby location.

6. Upon information and belief, Maca Restaurant Corp. has an annual gross volume of sales in excess of $500,000.

7. Maca Restaurant Corp. is owned and operated by Defendant Manuel Caisaguano

8. Defendant Caisaguano exercises sufficient control of the restaurants' day to day operations to be considered Plaintiff's employer under the FLSA and New York law.

9. Defendant Caisaguano hires and fires employees at Firenze Restaurant.

10. Defendant Caisaguano controls employees' schedules and rates of pay.

11. To the extent that employment records are kept for employees, Defendant Caisaguano maintains those records.

12. Plaintiff Jhonny Cabrera was employed as a server by Defendants from December 2010 until about February of 2017.

FACTS

13. Defendants committed the acts alleged in this Complaint knowingly, intentionally and willfully.

14. Defendants knew that nonpayment of the overtime premium would economically injure Plaintiff and violated federal and state laws.

15. Throughout Plaintiff's employment with Defendants, Plaintiff worked six days per week.

16. For the first three years (approximately) of Plaintiff worked 4 double shifts (lunch and dinner) and 2 dinner shifts.

17. For the remainder of Plaintiff's employment, he worked 3 double shifts and 3 dinner shifts.

18. Double shifts typically began at 11:30 a.m. and continued until closing time, which would be some time after 10:00 p.m.

19. During a double shift, Plaintiff took only a short break of roughly 20 minutes to eat lunch.

20. Dinner shifts typically began at 4:30 p.m. and continued to closing.

21. For the first approximately 3 years of Plaintiff's employment, Plaintiff received no pay other than his tips.

22. For the remainder of his employment, Plaintiff was paid for only 30 hours of work at the "tip credit" minimum wage, even though he worked well in excess of 40 hours per workweek.

23. Defendants were not entitled to pay Plaintiff pursuant to any tip credits, because they did not give him proper notice of the tip credits.

24. Defendants did not pay Plaintiff any "spread of hours" premium when Plaintiff's workday lasted longer than 10 hours.

25. Defendants did not give Plaintiffs any regular wage statements until approximately 2014. At that point, they began to give Plaintiff wage statements which were insufficient, because, *inter alia*, they did not recite Plaintiff's actual hours worked.

26. Defendants never gave Plaintiff a Notice and Acknowledgment of Pay Rate as required by NYLL § 195.

27. At the end of each of the first three years of Plaintiff's employment, Defendants issued and (upon information and belief) filed IRS W-2 forms which incorrectly stated Plaintiffs' wages.

28. Defendants did not distribute to Plaintiffs his tips from the last roughly 4 weeks of his employment.

FIRST CLAIM FOR RELIEF
(FLSA Minimum Wage Violations, 29 U.S.C. §§ 201, *et seq.*)

29. Plaintiff realleges and incorporates by reference all preceding paragraphs as if they were set forth again herein.

30. At all relevant times, Defendants have been, and continue to be, "employers" engaged in interstate "commerce" and/or in the production of "goods" for "commerce," within the meaning of FLSA, 29 U.S.C. § 203. At all relevant times, Defendants have employed, "employee[s]," including Plaintiff.

31. Throughout the statute of limitations period covered by these claims, Defendants knowingly failed to pay Plaintiff the federal minimum wage for each hour worked.

32. Plaintiff seeks damages in the amount of his unpaid compensation, liquidated (double) damages as provided by the FLSA for minimum wage violations, attorneys' fees and costs, and such other legal and equitable relief as this Court deems just and proper.

SECOND CLAIM FOR RELIEF
(FLSA Overtime Violations, 29 U.S.C. §§ 201 *et seq.*)

33. Plaintiff realleges and incorporates by reference all preceding paragraphs as if they were set forth again herein.

34. Throughout the statute of limitations period covered by these claims, Plaintiff regularly worked in excess of forty (40) hours per workweek.

35. At all relevant times, Defendants had operated under a decision, policy and plan of willfully failing and refusing to pay Plaintiff at one and one half times his regular hourly rate for work in excess of forty (40) hours per workweek and willfully failing to keep records required by the FLSA and relevant regulations, even though Plaintiff had been entitled to overtime.

36. At all relevant times, Defendants willfully, regularly and repeatedly failed to pay Plaintiff at the required overtime rate of one and a half times his regular rate for hours worked in excess of forty (40) hours per workweek.

37. Plaintiff seeks damages in the amount of his unpaid overtime compensation, liquidated (double) damages as provided by the FLSA for overtime violations, attorneys' fees and costs, and such other legal and equitable relief as this Court deems just and proper.

THIRD CLAIM FOR RELIEF
(New York State Minimum Wage Violations, N.Y. Lab. L. §§ 650 *et seq.*)

38. Plaintiff realleges and incorporates by reference all preceding paragraphs as if they were set forth again herein.

39. Defendants knowingly and willfully failed to pay Plaintiff the New York State minimum wage for all hours worked.

40. As a result of Defendants' willful and unlawful conduct, Plaintiff is entitled to an award of damages, including liquidated damages, in an amount to be determined at trial, pre- and post-judgment interest, costs and attorneys' fees, as provided by N.Y. Lab. Law § 663.

FOURTH CLAIM FOR RELIEF
**(New York State Overtime Violations, N.Y. Lab. L. §§ 650 *et seq.*
N.Y. Comp. Codes R. & Regs. tit. 12, § 146-1.4)**

41. Plaintiff realleges and incorporates by reference all preceding paragraphs as if they were set forth again herein.

42. It is unlawful under New York law for an employer to suffer or permit a non-exempt employee to work without paying overtime wages for all hours worked in excess of forty (40) hours in any workweek.

43. Defendants willfully, regularly and repeatedly failed to pay Plaintiff at the required overtime rate of one-and-one-half times his regular rate for hours worked in excess of forty (40) hours per workweek.

44. As a result of Defendants' willful and unlawful conduct, Plaintiff is entitled to an award of damages, including liquidated damages, in amount to be determined at trial, pre- and post-judgment interest, costs and attorneys' fees, as provided by N.Y. Lab. Law § 663.

FIFTH CLAIM FOR RELIEF
(New York Notice Requirements, N.Y. Lab. L. §§ 195, 198)

45. Plaintiff realleges and incorporates by reference all preceding paragraphs as if they were set forth again herein.

46. Defendants did not provide Plaintiff with the correct notices and/or statements required by N.Y. Lab. Law § 195.

47. As a result of Defendants' unlawful conduct, Plaintiff is entitled to an award of damages, including liquidated damages, in amount to be determined at trial, pre- and post-judgment interest, costs and attorneys' fees, as provided by N.Y. Lab. Law § 663.

SIXTH CLAIM FOR RELIEF
(New York Spread of Hours Provisions, N.Y. Lab. L. § 650 *et seq.*,
N.Y. Comp. Code R. & Regs. tit. 12, § 146-1.6)

48. Plaintiff realleges and incorporates by reference all preceding paragraphs as if they were set forth again herein.

49. Plaintiff had workdays that lasted more than ten (10) hours.

50. Defendants willfully and intentionally failed to compensate Plaintiff one hour's pay at the basic New York minimum hourly wage rate when his workdays lasted more than ten (10) hours, as required by New York law.

51. As a result of Defendants' willful and unlawful conduct, Plaintiff is entitled to an award of damages, including liquidated damages, in an amount to be determined at trial, pre- and post-judgment interest, costs and attorneys' fees, as provided by N.Y. Lab. Law § 663.

SEVENTH CLAIM FOR RELIEF
(Internal Revenue Code, 26 U.S.C. § 7434)

52. Plaintiff realleges and incorporates by reference all preceding paragraphs as if they were set forth again herein.

53. Defendants willfully filed W-2 forms that were fraudulent with respect to Plaintiffs' income.

54. As a result of Defendants' unlawful conduct, Plaintiff is entitled to an award of damages per unlawful filing equal to the greater of $5,000 the sum of his actual damages.

EIGHTH CLAIM FOR RELIEF
(Illegal Retention of Gratuities, N.Y. Lab. L. § 196-d)

55. Plaintiff realleges and incorporates by reference all preceding paragraphs as if they were set forth again herein.

56. Defendants retained Plaintiffs tips.

57. Defendants' retention of Plaintiff's tips was willful.

58. As a result of Defendants' willful violations of the N.Y. Lab. Law, Plaintiff is entitled to recover his unpaid compensation, liquidated damages as provided for by the New

York Labor Law, attorneys' fees and costs, pre- and post-judgment interest, and such other legal and equitable relief as this Court deems just and proper.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief as follows:

A. An award of damages, according to proof, including liquidated damages, to be paid by Defendants;

B. Penalties available under applicable laws;

C. Costs of action incurred herein, including expert fees;

D. Attorneys' fees, including fees pursuant to 29 U.S.C. § 216, N.Y. Lab. L. § 663 and other applicable statutes;

E. Pre-judgment and post-judgment interest, as provided by law; and

F. Such other and further legal and equitable relief as this Court deems necessary, just and proper.

Dated: New York, New York
April 7, 2017

Respectfully submitted,

JOSEPH & KIRSCHENBAUM LLP

By: ______________________

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